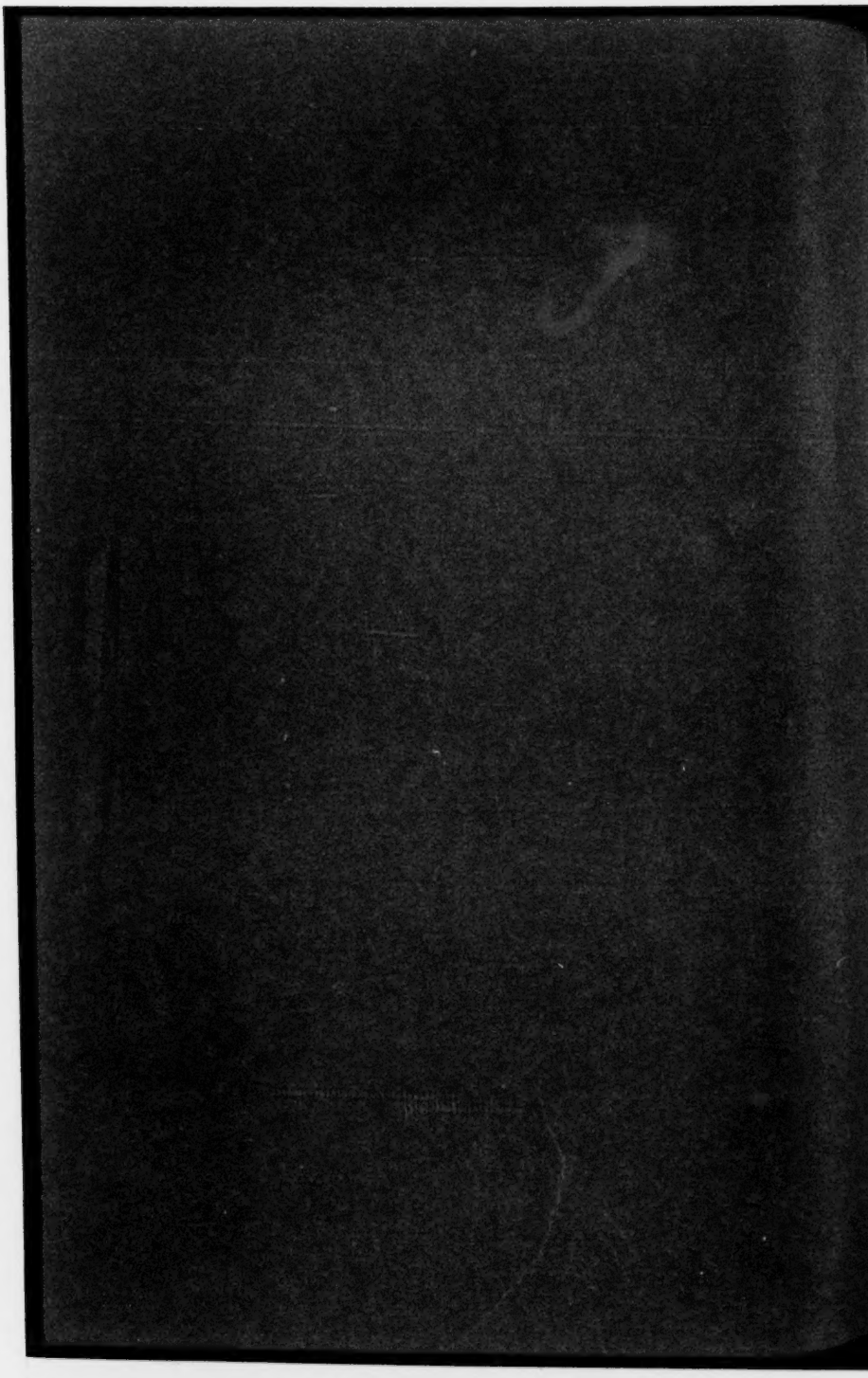
SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480



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IN THE

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No. 480

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, PETITIONERS,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The judgment herein sought to be reviewed is a final judgment.

The second paragraph of Rule 18 of the supreme court of Colorado (1 C. S. A. Supreme Court Rules, page 624) reads:

> "An order appointing, or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver, may be reviewed on error, before final judgment if prompt application for that purpose be made."

In any event, plaintiffs below have made it a final judgment in taking over all of the property and assets and the complete management of District Landowners Trust.

U. S. C. A. Vol. 28, § 344, sub. b, reads:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed upon by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;

and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Plaintiffs Without Legal Capacity to Bring Action.

The Record shows that plaintiffs were neither owners of land in the District or owners or holders of certificates of beneficial interest, and it requires no citation of authorities to show that they have not the legal capacity to institute or to maintain this action.

The Trial Court Had No Jurisdiction.

It is self evident that the trial court had no jurisdiction of the cause without a plaintiff or plaintiffs legally qualified to institute the action.

To Show Cause Why an Accounting of Trust Assets and Property Should Not Be Made.

1 Corpus Juris Secundum, page 662, § 30, reads:

"A suit for an accounting may be brought by any person who has an interest in the property or funds to be accounted for, and conversely, one who has no such interest cannot maintain the action."

Burden of Proof Placed on Defendants to Show Cause Why a Receiver Should Not Be Appointed Over Trust Assets.

"The burden is on applicant to show a proper cause for the appointment of a receiver and the necessity therefor. Except where it is required by the mandate of an appellate court, an appointment is erroneous when made in a suit wherein no evidence is introduced and the petition is not verified; before the appointment may properly be made, applicant must offer satisfactory proof in some form, and the showing made must be sufficient."

53 Corpus Juris, page 65, Part § 64.

The Colorado Code of Civil Procedure (1 C. S. A., page 272, § 180), reads:

"A receiver may be appointed by the court in which an action is pending, or by a judge thereof, or, pending proceedings in the supreme court upon appeal or writ of error, by the court from whose final judgment such appellant proceedings are prosecuted, or by the judge of such court:

"First—Before judgment, provisionally, on application, when he establishes a prima facie right to the property, or to an interest in the property, which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired."

In Holding That There Was Any Evidence Sufficient to Warrant Impounding the Books.

No evidence will be found in the entire Record to warrant the impounding or the accounting of the books and records of the Trust.

In Holding That Plaintiffs Could Include in Their Complaint the Trust and the Trustees and Also Against Present and Past Trustees in Their Individual Capacity.

The Code of Civil Procedure of Colorado (1 C. S. A., pages 158-159), reads:

> "The plaintiff may unite several causes of action in the same complaint, when they all arise out of any one of the following classes; provided, they affect all of the same parties, both plaintiff and defendant, and affect them in the same character and capacity; * * *"

See following Colorado cases upholding this provision of the Code:

Merrill v. Suffa, 42 Colo. 195, 201, 93 P. 1099, 1104.

Dubois v. Bowles, 30 Colo. 44, 51, 69 P. 1067, 1072.

Faust v. Smith, 3 Colo. App. 505, 506, 34 P. 261, 262.

In Holding That There Was Any Evidence Sufficient to Warrant the Appointment of a Receiver.

No evidence can be found in the entire Record to warrant such appointment.

In Holding That the Term of The Trust Had Expired.

The original term of the Trust was legally extended as shown by the Record, at pages 92-96, and this question was determined by the supreme court of Colorado, in *District Landowners Trust v. Doherty*, 94 Colo. 385, 391, 30 P. (2d) 319, reading:

> "An unexecuted trust will not terminate because of a delay on the part of the trustee in executing it, notwithstanding the trust instrument directs its execution within a certain time" (citing 65 C. J., p. 352, § 125). "Considering the requirements in relation to things to be done by the trustees, as set forth in the declaration and certificate, and the lack of definite statement with reference to when the trust must be executed, and the uncompleted state thereof, it harmonizes with reason to say it should at least continue until so administered that the certificate of indebtedness sued on, and the like one referred to therein, are discharged in accordance with their terms."

Removing the Trustees and Replacing Them With a Receiver.

In 65 Corpus Juris 353, Sec. 128, in treating this subject, says:

> "By decree of court—(1) In General. Courts of equity in the exercise of their supervisory power may, in a proper case, before the expiration of the term for which an express trust is created, change it; but exceptional circumstances must exist. It is only when all the parties in interest are before the court, when each is sui

juris, and all join in the application that a court of equity ever terminates a trust. Even when all these circumstances exist, equity does not do so by force of the application, but only when a decree is proper. When such circumstances exist power is in the court of equity, but with the power is not necessarily imposed the duty to exercise it. It is still discretionary, but the court may not arbitrarily deny the termination of a trust. The court will be careful not to defeat any object of the creator apparent from his declaration of the purposes of the trust. Where the trustee is given discretionary power to terminate the trust at an appointed time, or upon certain contingencies, the court may terminate the trust where the trustee unjustifiably refuses to convey the property to the beneficiary. The court may terminate a trust where it is for the best interest of the sole beneficiary as settlor.

Enjoining Defendants From Using Any Trust Funds for Attorney's Fee.

It is quite apparent from the Record herein that the trial court, and the supreme court by denying the petition for a receiver, fully intended to deprive the Trust and Melville of any funds to have the cause reviewed by this Court

In *People ex rel v. District Court*, 33 Colo. 293, 80 p. 908, a case very similar to the instant case, a writ of prohibition issued against the lower court, and, at page 297, the court said:

> "In brief, the allegations of the complaint charge mismanagement, fraud, and ultra vires acts against the officers of the corporation, already committed, and plaintiffs fear that similar

acts will be perpetrated. Some of these charges, made against Daniels and Merrill, are, if true, wrongs against the plaintiff, as a stockholder, and some wrongs against him in his individual capacity. The prayer for relief is for damages against the defendants in the sum of seventeen thousand dollars, for a decree setting aside the charter and corporate powers of the different corporations, dissolving them and closing up their business, for an injunction pending the litigation restraining the defendants from further wrongful acts in their management, and from disposing of their corporate property or assets, and for the appointment of a receiver. The demurrer and motion were heard at the same time, and the court overruled them, and, as appears from its opinion in passing upon the same, without giving the defendants an opportunity to answer, immediately, and indeed, before the formal order overruling the motion and demurrer was announced appointed a receiver of the property, naming him, and on the same day approved his bond, and ordered the corporate officers at once to turn over all their properties and effects, books, deeds, etc.; in effect substituting its own receiver for the officers of all these corporations. * * * It is a rule in this state, as generally in the country, that in the absence of a permissive statute, courts of equity have no power to dissolve a going business corporation, and to that end appoint a receiver for the sequestration of the corporate property."

That in view of the eleventh, twelfth, thirteenth and fourteenth assignments of error being in contravention of article five and of section one of article

14 of the amendments to the Constitution of the United States, it becomes the duty of this Honorable Court to so determine.

Missouri, K. & T. Ry. Co. v. Love, 174 Fed. 493, 502-503, reading:

> "Presumably the commissioners preserved a due relation among them so far as practicable in such cases, and there is no contention that rates left untouched are relatively as low. When all the local freight earnings are considered, an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause.
>
> "Upon the proofs temporary injunctions should be granted. Provisions made in the orders for the keeping of accounts and the giving of bonds safeguarding, so far as practicable, the patrons of the roads if it should ultimately be determined the enforcement of the rates should not have been suspended."

In *Love v. Atchison, T. & S. F. Ry. Co.,* 185 Fed. 321, the foregoing case was reviewed by the Eighth Circuit Court of Appeals, and the court beginning at page 331, said:

> "But the granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and where, as in the case in hand, that court has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused discretion. (Citing numerous cases.)
>
> "An appeal from an order granting or refusing an interlocutory injunction does not in-

voke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion? Massie v. Buck, 128 Fed. 27, 31, 62 C. C. A. 535.

"The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremedial injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted." (Citing cases).

"But counsel argue (1) that this rule applies only to cases in which the purpose and effect of the injunctions are to maintain the status quo, and these injunctions were issued to change it; (2) that the companies acquiesced in the fare and the rates, and thereby, and by the fact that new industries have grown up in reliance upon

them, they are estopped from enjoining them; and (3) that there were no emergency requiring the issue of the injunctions. These arguments are material only on the assumption that the fare and the rates were confiiscatory; for if they were reasonable and just, all concede that no injunctions should have issued. If they were confiscatory, and injunctions had issued against the enforcement of the constitutional provision and the orders which prescribed them before they went into effect, upon such opinion evidence as could then have been produced, they would have fallen under and would have been sustained by the established rule, which has been cited. A fortiori, should they be sustained now, when their issue is based on the more certain and convincing evidence of the necessary effect of the actual operation of this fare and these rates during a trial of about two years?

"Again, the operation of the fare and rates was a continuing unconstitutional taking of the property of the companies from the time they were put into effect until their enforcement was enjoined. The companies' obedience to the provision of the Oklahoma Constitution and to the orders that installed the rates was under protest, under the penalty of drastic fines for a failure to obey, and was fully justified by their situation and the wisdom of an actual test and operation of the fare and the rates, in order certainly to determine and clearly to prove their effect. And even asquiescence in past continuing injuries does not estop their victim from enjoining their future continuance. One may not escape an injunction against his cutting the remainder of the trees on his neighbor's lands, be-

cause the latter acquiesced in his cutting a part of them, nor an injunction against his future infringement of his neighbor's patent, because he has long infringed it with impunity, nor an injunction against his continuing trespass upon his neighbor's land, because he has long trespassed without rebuke." (Citing cases.)

"Moreover, in truth, the purpose and effect of these injunctions were to restore and maintain the status which existed before the unconstitutional acts of the people and the officers of Oklahoma disturbed that status, and thereby to prevent the irreparable injury which the companies must otherwise have suffered during the pendency of these suits. Plenary power is conferred, and the undoubted duty is imposed, upon a court of equity to issue its injunction for such a purpose" (Citing cases). "The protests of the companies against the fare and the rates and the fourteenth amendment to the Constitution constitute ample notice to the officers of the state and to the owners of the new industries that sprung up along the railroads that they could not acquire any right to continuous confiscatory fares and rates by the acquiescence of the companies in a test of their actual operation. The companies were not estopped thereby from obtaining the injunctions (Southern Pac. Co. v. Interstate Commerce Com., 219 U. S. 438, 449-452, 55 L. Ed. 283, 289-290), and no greater emergency than the daily and continual taking of some part of their properties without just compensation during the long time that experience has demonstrated to be necessary to press one of these rates cases to final decree was required to justify the issue of the injunctions.

"The single question remains: Does the evidence clearly show that the court below was guilty of an abuse of its discretion in its finding that the necessary effect of this fare and these rates was to deprive the companies of a fair return upon the values of their respective properties in Oklahoma? This question must be answered in the negative. No good purpose would be served by an attempt to recite or review the voluminous testimony upon the various issues which lead up to this conclusion. Suffice it to say that this court is unanimous in its opinion that the record in this case, not only fails to prove any abuse of discretion by the court below in the isuance of these injunctions, but sustains its findings that the fare and rates in question are confiscatory and its orders for the issue of the injunctions.

"Those orders must be affirmed; and it is so ordered."

See also:

Thompson v. Hays (Eighth Circuit Court of Appeals), 11 Fed. (2d) 244, 247-250.

Truax v. Corrigan, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

Adams v. Sanger, 303 U. S. 59, 60, 82 L. Ed. 649, 650.

Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 372-374, 58 L. Ed. 1001, 1004-1005.

Krause Brothers Lumber Co. v. Mellon, 276 U. S. 386, 391-394, 72 L. Ed. 620, 622-624.

On certiorari the Supreme Court will examine the Record, and reverse for legal insufficiency.—Simpkins Federal Practice (3d ed.), Sec. 964, page 684, citing:

C. M. & St. Paul R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043.

Respectfully submitted,

I. B. MELVILLE,
Attorney pro se and for other Petitioners.